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THE APPAM CASE

THE arrival of the fine British passenger vessel *Appam* at Newport News on January 31, 1916, in charge of a German prize crew and with about four hundred and fifty British subjects, passengers and sailors, including the Governor of Sierra Leone and some other prominent officials, not only created a picturesque situation, but raised some very important problems of international law.

The activities of the British Navy had practically cleared the seas of German raiders and it was not until the arrival of the *Appam* that the exploits of the German cruiser *Moewe* were revealed. This active and intrepid belligerent, escaping the blockade in the North Sea, had captured and destroyed some fifteen merchant vessels during a cruise lasting several months and finally returned unscathed to her home port in March, 1916. The *Appam* was, when captured off the West Coast of Africa, 1590 miles from Emden, the nearest German port, 130 miles from Puncello in the Madeiras, the nearest available port, 1450 miles from Liverpool, and 3051 miles from Hampton Roads. The *Appam* carried a gun, but she made no resistance to capture. The commander of the *Moewe* placed Lieutenant Berg, an officer of the German Naval Reserve, on board as commander, together with a crew of twenty-two men. Lieutenant Berg placed bombs in various portions of the vessel and informed the officers and crew that in case of any trouble the vessel would immediately be blown up. The German crew did not operate the vessel, but merely navigated her and acted as an armed guard under whose vigilant firearms the British crew and especially the engine room force were kept at work until the vessel came into the harbor of Hampton Roads, where she arrived on January 31, in first-class order, seaworthy and supplied with provisions. The prisoners brought in by the *Appam* were released by the United States Government. Berg reported to the Collector and filed with him a copy of his instructions from the commander of the *Moewe*. These brief instructions were a most

important factor in the case. They directed Berg "*to bring this ship into the nearest American harbor, and there to lay up.*"

Subsequent to the arrival of the *Appam* the German Ambassador informed the State Department that the *Appam* was not an auxiliary cruiser, or a tender, but a prize, and claimed that she should be allowed to remain in an American port in accordance with Article XIX of the treaty with Prussia of 1799. The American Secretary of State in a careful and lucid opinion held that article of the treaty inapplicable and found no warrant in international law for the *Appam's* entrance into an American port.

On February 16th, sixteen days after the arrival of the *Appam* in Hampton Roads, the owner filed a libel to recover the vessel on the ground that she was in American waters in violation of the law of nations and the neutrality of the United States. The Prize Master and German Vice-Consul, appearing as claimants and respondents, claimed on behalf of the German Government that the *Appam* was brought there in reliance upon the treaty with Prussia and, moreover, that under general principles of international law she was entitled to stay an indefinite time in an American port. The institution of prize proceedings in the competent German court was also pleaded, and it was claimed that the American courts were without jurisdiction.

The case was fully tried and argued before the United States District Court, which held that the court had jurisdiction and that the *Appam*, having come into an American port in violation of American neutrality, should be released to her former owners. The case was appealed by the respondents to the Supreme Court of the United States. The holding of that court was that the decisive questions in this case resolved themselves into three:

1. Was the use of an American port, under the circumstances shown, a breach of this nation's neutrality under the principles of international law?
2. Was such use justified by existing treaties?
3. Was there jurisdiction over the *Appam* and her cargo in a Court of Admiralty of the United States?

All of these questions were answered in favor of the owners of the vessel and cargo; the judgment of the District Court was affirmed,

and the interesting and important questions involved set at rest so far as the United States was concerned. The opinion of the court is unanimous and the reasons for its decision are precisely and pithily set forth by Mr. Justice Day. I can here do little more than amplify some of the reasoning of the decision.

A very elaborate argument in both courts turned upon three questions:

(a) The rule of international law as to the treatment to be accorded to prizes in neutral ports prior to condemnation.

(b) The effects of the Prussian treaty upon the status of such ships in American ports, and

(c) The jurisdiction of the courts of the United States to pass upon the question and their power to release the vessel to the former owners.

It was contended by the German Government that under the general rules of international law any nation might permit a belligerent to send prizes into its ports for sequestration and that such prizes might remain indefinitely in such ports without interference from the local jurisdiction. It was admitted that a nation might by proclamation prior to the outbreak of hostilities announce that its ports would not be open to receive prizes, but it was claimed that in any other event prizes should be accorded asylum.

It appears to me that the German contentions ignored the development of international law in this respect, and especially the position assumed by the United States in developing the rights and duties of a neutral. The whole question was fully discussed at the Hague Conference of 1907 and the result was the provisions of Articles 21, 22 and 23 of Convention XIII. These articles read as follows:

ARTICLE 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

ARTICLE 22. A neutral Power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

ARTICLE 23. A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought

there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a warship, the prize crew may go on board the convoying ship. If the prize is not under convoy, the prize crew are left at liberty.

It is clear that had all the Powers ratified these three articles, the United States would have had it in its power to allow vessels to be sequestered in its ports, but this, it would seem, on the face of Article 23, would have required positive action preliminary to the outbreak of hostilities. The action of the United States, however, in regard to this convention was highly significant and emphatically indicates the policy of this nation on the question. The American delegates in their report to the Government stated as to Article 23:

This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse and should not be approved.

The delegates, therefore, refused to approve Article 23, but approved Articles 21 and 22. These articles were ratified by the Senate of the United States and the act of ratification states: "That the United States adheres to the said Convention, subject to the reservation and exclusion of its Article 23."

This demonstrates the view of the Executive and of the Senate, that is, of the treaty-making power, as to the rule approved by the Government of the United States. This action of the treaty-making power is in accordance with the precedents of the United States and with the spirit shown by our government since its foundation in protecting its neutral rights. The rule, however, preventing a belligerent from using a neutral port as a place of deposit for its spoils is an ancient one. It may be found in old French ordinances of the sixteenth and seventeenth centuries. In 1658 the States General of Holland declared in favor of the rule, and "That if any one should act to the contrary, the prize should be restored to the former owner as though it had never been taken."

The distinction found in Article 21 of the Hague Convention is nevertheless always made that a vessel taking refuge from the weather, or when short of provisions, may seek temporary shelter in a neutral port. This is based upon grounds of humanity.

Early rulings of Lord Stowell are to the same effect and the practice of sequestration was condemned by him on the ground that "It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found."

It is interesting to observe that the German Prize Code itself expressly adopts the rules of Articles 21 and 22, for it declares:

A prize may be brought into a neutral port only if the neutral Power permits the bringing in of prizes. A prize may be taken into a neutral port on account of unseaworthiness, stress of weather, or lack of fuel and supplies. In the latter case she must leave as soon as the cause justifying her entrance ceases to exist.

As long ago as 1866 the rule was admirably stated in Dana's note to Wheaton: "The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in case of necessity, and they may remain in the ports only for a meeting of the exigency."¹

It is true that, as the delegates to The Hague say, certain abuses did arise and that in the eighteenth century may be found bases in which prizes were allowed to be sent into neutral ports for sequestration. This, however, could not be done without the consent, express or implied, of the neutrals, and aside from the treaties shortly to be mentioned, the United States never consented to such a practice.

In principle such asylum is evidently a violation of the fundamental obligations of neutrality. If applied to the present war, it would mean that German submarines operating on our coast might have brought into our ports several hundred belligerent vessels, and thus made our territory the basis from which to carry on their raiding expeditions. This is the view adopted by the great German commentator Bluntschli himself, for he says:

If, on the contrary, the victor brings his prize into a neutral port in order to make her more safe and so that he may fly the more quickly to new conquests, he would be using the neutral territory as a base of operations, which could not be tolerated. The neutral state should then, in order clearly to indicate its intention to remain neutral, refuse the

¹ Wheaton's Int. Law, 8th Am. ed. sec. 391.

entry of its ports to all prizes taken by belligerents unless there is a question of ships in distress.²

Such was the attitude adopted by foreign nations toward the United States during the Civil War. As early as June, 1861, the British Foreign Office instructed the Admiralty that, pursuant to the desire of Her Majesty's Government to observe the strictest neutrality between the United States and the Confederate States, the armed ships and privateers of both parties are interdicted "from carrying prizes made by them into the ports, harbors, roadsteads or waters of the United Kingdom, or of any of Her Majesty's Colonies or possessions abroad." These instructions were rigidly carried out, and similar rules announced by France, Belgium, The Netherlands, Spain, Portugal, and Hamburg and Bremen, then free states. That this was the law and the usual and proper practice of nations appears clearly from Mr. Seward's communication to the Peruvian Legation as to the course the United States would pursue during the war between Spain and Peru: "This government will observe the neutrality which is enjoined by its own municipal law and by the law of nations. No armed vessels of either party will be allowed to bring their prizes into the ports of the United States."

It is difficult to see how, at this late date, this practice, so consonant with common sense, supported by authority, consecrated by long practice and approved by the United States officials and its treaty-making power, should now be put in question.

The German Government during the course of the litigation laid much stress upon the incident of the Bergen Prizes. These were British vessels taken as prizes by Paul Jones and sent into Bergen, which Denmark seized and restored to their former owners on the ground that it had not acknowledged the independence of the United States and the prizes could not be considered as lawful. The prizes were sent into Bergen under stress of weather and for necessary repairs, which might have justified the claim of the United States, but in any event that claim was not acceded to, no arbitration was had, and so far as any precedent at all was created, it was against the right of sequestration.

We must remember that international law is continually in process of growth. Originally the concept of neutrality was of a very vague

² International Law Codified, sec. 778 notes.

character and belligerents refused to recognize neutral rights. During our Revolutionary War these rights were still unsettled. It was the course of the United States subsequent to the Revolution and during the long wars ensuing from the French Revolution which did so much to place on a definite basis the rights and duties of neutrals. This was very clearly indicated throughout the painful controversy with France engendered by the acts of M. Genet in fitting out ships and establishing prize courts in American ports. The treaties with France of 1778 and 1800 contained a provision substantially similar to that contained in the Prussian treaty of 1799 and relied upon by the German Government as justifying the sending of the *Appam* into an American port. Article XXIV of the treaty with France of 1800 and Article XIX of the treaty with Prussia of 1799 are juxtaposed in parallel columns, where their similarity may easily be seen.

Treaty With Prussia, 1799
Article XIX

The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges or fees to officers of admiralty or of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain no vessel, that shall have made a prize upon British subjects, shall have a right to shelter in the ports of the United States, but if forced therein by tempests or any other danger, or accident of the sea, they shall be obliged to depart as soon as possible.

Treaty With France, 1800
Article XXIV

When the ships of war of the two contracting parties, or those belonging to their citizens which are armed in war, shall be admitted to enter with their prizes the ports of either of the two parties, the said public or private ships, as well as their prizes, shall not be obliged to pay any duty either to the officers of the place, the judges or any others; nor shall such prizes when they come to and enter the ports of either party, be arrested or seized, nor shall the officers of the place make examination concerning the lawfulness of such prizes; but they may hoist sail at any time and depart and carry their prizes to the places expressed in their commissions, which the commanders of such ships of war shall be obliged to show. It is always understood that the stipulations of this article shall not extend beyond the privileges of the most favored nation.

Relying upon this treaty, Genet undertook to have French consuls establish prize courts in American harbors and to use such harbors for fitting out privateers to prey upon British commerce. Great Britain naturally protested and much diplomatic controversy ensued. Finally, Mr. Jefferson stated the views of this government, as follows:

The doctrine as to the admission of prizes maintained by the government from the commencement of the war between England, France, etc., to this day has been this: The treaties give a right to armed vessels with their prizes to go where they please (consequently into our ports) and that these prizes shall not be detained, seized or adjudicated, but that the armed vessel may depart as speedily as may be with her prize to the place of her commission; and we are not to suffer their enemies to sell in our ports the prizes taken by their privateers. Before the British treaty, no stipulation stood in the way of permitting France to sell her prizes here; and we did permit it, but expressly as a favor not as a right. . . . These stipulations admit the prizes to put into our ports in cases of necessity, or perhaps of convenience, but no right to remain if disagreeable to us; and absolutely not to be sold.

And Mr. Pickering, Secretary of State in 1796, held that the sale of prizes brought by armed ships of the French Republic into our ports was not a right to which the captors were entitled either by the law of nations or our Treaty of Amity and Commerce with France.

Thus, even at a time when the general rule was much less firmly established than at present and when every consideration dictated the most sympathetic treatment of France, prizes even when arriving with their captors were only allowed temporary stay in our ports. The possibilities which might have arisen from giving to the treaty a wider interpretation were vividly impressed upon the officials of Washington's administrations, and had it not been for the firm attitude adopted by them in preventing our ports from being used as a deposit for the spoils of war, we should have been dragged into war long before 1812.

The German Government claimed from the beginning of this litigation that the *Appam* had been sent into Newport News in reliance upon Article XIX of the Prussian treaty. It was quite evident that they intended to make of this a test case. Had they prevailed in their

contentions the United States ports, if the government remained neutral, would have been of the utmost convenience to them in the not improbable event of submarine operations along our coast. Such operations could have been much more effectively carried on here than in the waters surrounding the British Channel and would, in fact, not only have stopped shipping so effectively as to create a blockade here, but would have created for the German Government a fine fleet of merchant vessels for use after the war. It is, therefore, not to be wondered at that the German Foreign Office felt that it had discovered in Article XIX a war instrument of superlative value.

The question was raised *in foro* before the State Department by Count Bernstorff, late German Ambassador. He insisted that the *Appam* was under the treaty immune from the jurisdiction of our courts, and that she might remain sheltered in our ports indefinitely. The State Department gave very careful consideration to the question and held the treaty inapplicable. As it would be impossible to condense the very succinct reply of the Secretary of State, whose statement of the law was approved by the Supreme Court of the United States, I cite it as follows:

At the outset it may be pointed out that as the object of this provision was to mollify the existing practice of nations as to asylum of prizes brought into neutral ports by men-of-war it is subject to a strict interpretation when its privileges are invoked in a given case in modification of the established rule. By a reasonable interpretation of Article XIX, however, it seems clear that it is applicable only to prizes which are brought into American ports by vessels of war. The *Appam*, however, as your Excellency is aware, was not accompanied by a ship of war, but came into the port of Norfolk, alone in charge of a prize master and crew. Moreover, the treaty article allows to capturing vessels the privileges of carrying out their prizes again "to the places expressed in their commissions." The commissions referred to are manifestly those of the captor vessels which accompany prizes into port and not those of the officers of the prizes arriving in port without convoy, and it is clear that the port of refuge was not to be made a port of ultimate destination or indefinite asylum. In the case of the *Appam*, the commission of Lieutenant Berg, a copy of which was given to the collector of customs at Norfolk, not only is a commission of a prize master, but directs him to bring the *Appam* to the nearest American port and "there to lay her up." In the opinion of the Government of the United States, therefore, the case of the *Appam* does not fall within the evident

meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while en route to the places named in the commander's commission, but not the deposit of spoils of war in an American port. . . . Under this construction of the treaty the *Appam* can enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of war, namely, to enter neutral ports only in case of stress of weather, want of fuel and provisions or necessity of repairs, but to leave as soon as the cause of their entry has been removed.

This ruling of the Department of State thus accords with American precedent as established in the case of the treaty with France, and further emphatically states the general international rule. As the Supreme Court puts it:

Certainly such use of a neutral port is very far from that contemplated, which made provision only for temporary asylum for certain purposes, and cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes of a belligerent government.

On the broad questions of international law, in addition to those heretofore considered, counsel for the German Government, especially in their argument before the Supreme Court, based their claims largely, if not mainly, upon lack of jurisdiction in the court to entertain such a suit. The rights of the British owners, so the argument ran, had been extinguished upon the capture of the vessel, which in itself transferred title to Germany, and, even admitting that the United States might have excluded such vessels as a matter of law or policy from their ports, no court was empowered to restore such a vessel to the original owners, who had lost every scintilla of right and title therein. This argument pressed with vigor, might seem upon superficial examination to present considerable plausibility. It was, however, of a highly technical character and is scarce alluded to in the opinion of the court.

It was admitted that from the beginning of the Republic our courts have taken jurisdiction: (1) In cases of capture in our territorial waters; and (2) In cases where the capturing vessel had fitted out or increased her crew or armament in an American port. The jurisdiction of our courts in this class of cases was directly derived from the Constitution, and not dependent upon statutory enactments. In the famous case of *The Betsey* (3 Dall. 6), decided prior to the enactment of the first

neutrality statute, the Supreme Court held that the Federal Courts had jurisdiction in all such cases, and the proposition has not since been questioned.

It was strenuously endeavored to differentiate these cases on the ground that, as there had been no illegality in the capture, complete title had passed and the original owners were thus deprived of all standing in court, and that the question of prize was one for the German Prize Court, over which it had exclusive jurisdiction. The vice of this argument, however, lay in the assumption that full title passed at the moment of capture. It ignored the fact that while the vessel remained in the condition of a mere prize, recapture might be effected and in the event of recapture the rights of the lawful owner would revert.

From early times it has been held that mere capture is not sufficient to divest the title of the owner. The requirements for such divestment have fluctuated somewhat. Early cases held the rule of pernoctation or twenty-four hours firm possession, but later cases held the rule of *infra praesidia*, and finally the rule now established is that the vessel must be brought within the jurisdiction of the proper prize court and that the rights of the owner are not completely divested until a decision is there had. When a vessel captured by an enemy warship is recaptured, we say that the title of the original owners reverts or is re-established. It might be more exact to say that their right, menaced with extinction by the establishment and perfection of an adverse right, has been freed from this menace; and that the full exercise of their right has again become possible. This construction is more satisfactory; because it is clear that, if the enemy state had acquired full title by capture, recapture would logically vest title not in the original owners, but in their government.

The rule is as old as the *Consulatus Maris*. It could not be better stated than in the opinion of Justice Storey, in the case of *The Star*, 3 Wheaton, 78, 86:

It is admitted, on all sides, by public jurists, that in cases of capture a firm possession changes the title of the property; and although there has been in former times much vexed discussion as to the time at which this change of property takes place, whether on the capture, or on the pernoctation, or on the carrying *infra praesidia* of the prize; *it is universally allowed that, at all events, a sentence of condemnation completely*

extinguishes the title of the original proprietor, and transfers a rightful title to the captors or their sovereign.

This rule is indeed in conformity with common sense. Had the *Appam* attempted to go to the nearest German port it would have risked almost certain capture by British cruisers; it followed the much safer course of traveling more than twice the distance and taking refuge in an American port. It was thus by the interposition of an American port between the *Appam* and the British fleet that the German Government hoped to save the vessel for their future benefit. Had not this illegal use of an American port been resorted to the vessel would in all human probability have been recaptured and restored to its former owners. The rule of law is thus in consonance with the dictates of common sense. Bluntschli himself says:

1. Up to the time when the tribunal has taken jurisdiction and condemned the prize the fate of the latter is uncertain; neither the captor nor his government have as yet rights over the vessel or its cargo, the prize resting up to the date of the judgment merely upon the right of the stronger; the seizure may be annulled by force. This is a special application of the rights of *post liminium* and in *integrum restitutio*.

2. The recapture has effects essentially negative; it annuls the capture (prise). It does not even constitute a new capture (prise). The recaptor must then respect the goods which he has saved from the hands of the enemy and for his service can only claim a recompense.³

And he again states the rule: "The recapture of captured vessels may take place so long as prize courts have not pronounced upon the validity of the capture."

We find upon this point French and German in agreement, for one of the leading modern commentators, Bonfils, formulates the proposition very happily thus:

No. 1416. *Recaptions*. A merchant ship is captured by a hostile war vessel, then recaptured by a war ship of its own nation. What are the effects of this rescue? Do the ship and its cargo revert to their owners, or do they become the property of the recapturing government? From the point of view of jurisprudence this question, it would seem, ought to raise no difficulty. Until the judgment passed upon the validity of the capture shall recognize its legitimacy and shall order the confiscation of the ship and of the cargo, the captor has acquired no right

³ International Law Codified, paragraph 860, notes.

of ownership. The right of the owner who has been dispossessed has been paralyzed but not extinguished. The recaptor can have no more right than those from whom he has recaptured the prize. The owner ought then to re-enter into possession of the property taken from him by violence. Such a decision is logical and in accordance with the spirit of justice.

The solution of this question could be different only if it were assumed that the very fact of capture *per se* transferred to the captor the ownership of the captured ship and cargo. Under this assumption whatever right the original captor had acquired by the capture would pass to the recaptor.

This rule is embodied in the United States Prize Act, U. S. Revised Statutes, section 4652.

It is, therefore, not to be wondered at that the Supreme Court promptly but effectively disposes of the question as follows:

The violation of American neutrality is the basis of jurisdiction, and the admiralty courts may order restitution for a violation of such neutrality. In each case the jurisdiction and order rests upon the authority of the courts of the United States to make restitution to private owners for violations of neutrality where offending vessels are within our jurisdiction, thus vindicating our rights and obligations as a neutral people.

It is fortunate that in a case of such far-reaching importance, involving fundamental propositions of international law, both our Executive and our courts have passed upon the question after most mature consideration and have reached similar conclusions embodied in definite, authoritative decisions.

FREDERIC R. COUDERT.